

# Project On Government Oversight

Exposing Corruption Exploring Solutions [www.POGO.org](http://www.POGO.org)

May 23, 2005

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Hard copy to follow

Defense Acquisition Regulations Council

Attn: Ms. Robin Schulze

OUSD(AT&L)DPAP(DAR)

IMD 3C132

3062 Defense Pentagon

Washington, DC 20301-3062

Re: DFARS Case 2004-D021

Dear Ms. Schulze:

The Project On Government Oversight (POGO) appreciates the opportunity to comment on 70 *Federal Register* 14572 (March 23, 2005) – “**Defense Federal Acquisition Regulation Supplement; Contractor Performance of Acquisition Functions Closely Associated With Inherently Governmental Functions.**” Founded in 1981, POGO investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests. POGO supports the interim rule because it places some controls on the award of contracts for the performance of jobs closely associated with the federal government’s purchases of goods and services. As we have witnessed in recent months, failures in the procurement system have jeopardized taxpayer dollars.

POGO commends the Department of Defense’s (DoD’s) efforts to make contracting officers accountable for their decisions. However, transparency must also be added to the interim rule. Contracting officers should provide written justifications supporting the three (3) criteria listed at 10 U.S.C. § 2383(a). Public disclosure of those decisions will protect against outsourcing jobs that should be performed by government personnel while allowing government officials, Congress, and the public to see the decision making process.

The government should protect inherently governmental functions. POGO is concerned at the breadth of the “functions generally not considered to be inherently governmental” listed at FAR 7.503(d). According to the FAR, currently contractors can prepare the federal budget, develop statements of work, support acquisition planning, and assist in contract management; however, POGO believes contractors should not be allowed to perform those functions.

POGO’s concerns pertain to the expanding definition of the term “inherently governmental function,” which is a looming problem for the federal government. That expanded definition is creating a world in which the government’s priorities and spending are being heavily influenced by for-profit companies. As a result, personal and corporate conflicts of interests

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and ethics concerns are on the rise. POGO is increasingly concerned that the roles of the contractors and federal employees are blurring, particularly in the world of acquisition.

It appears that the General Accountability Office (GAO) also believed it is essential to retain government control of acquisition functions.

It is clear that government workers need to perform certain warfighting, judicial, enforcement, regulatory, and policymaking functions, and the government may need to retain an in-house capability even in functions that are largely outsourced. Certain other capabilities, such as adequate **acquisition skills to manage costs, quality, and performance and to be smart buyers of products and services, or other competencies such as those directly linked to national security, also must be retained in-house to help ensure effective mission execution.** (Emphasis added).

GAO, Commercial Activities Panel, *Improving the Sourcing Decisions of the Government* at 9, 36, 48 (April 2002).

DoD's interim rule pertains to jobs that are categorized as "inherently governmental"<sup>1</sup> functions (*i.e.*, jobs that **must** be performed by government employees) and "not inherently governmental" functions (*i.e.*, jobs that can be performed by contractor personnel). The objective of the interim rule is to ensure proper management and oversight of contracts for functions that generally are not considered to be inherently governmental. In other words, DoD wants to place some controls on jobs that may be performed by contractor personnel – jobs that approach being categorized as inherently governmental because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the government oversees contractor performance.

This interim rule implements Section 804 of the National Defense Authorization Act for Fiscal Year 2005 (Public Law 108-375) – codified at 10 U.S.C. § 2383 (effective October 28, 2004). Section 804 provides that DoD may enter into contracts for the performance of "acquisition functions closely associated with inherently governmental functions" only if:

(1) Appropriate DoD personnel "cannot reasonably be made available to perform the functions;"

(2) appropriate DoD personnel will "supervise contractor performance of the contracts" and will "perform all inherently governmental functions associated with the functions to be performed under the contract;" and

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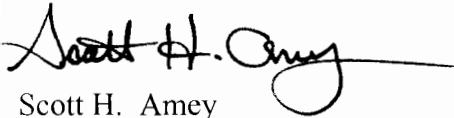
<sup>1</sup> Section 5 of Pub. L. No. 105-270 (the "Federal Activities Inventory Reform Act" (1998)) defined an inherently governmental function as a "function that is so intimately related to the public interest as to require performance by Federal Government employees." *See also* office of Management and Budget, Office of Federal Procurement Policy, *Policy Letter 92-1 to the Heads of Executive Agencies and Departments – Subject: Inherently Governmental Functions*, September 23, 1992, p. 1.

(3) DoD “addresses any potential organizational conflict of interest of the contractor in the performance of the functions under the contract” consistent with Subpart 9.5 of Part 9 of the Federal Acquisition Regulation (FAR) and the best interests of DoD.

In light of recent procurement scandals, including the Darleen Druyun situation, contractors overseeing other contractors, and the Abu Ghraib prison abuses, the federal government must better oversee the way it purchases goods and services. Integrity must be restored to the purchasing system and jobs related to that system should not be handed over to contractor personnel.

POGO does not believe that acquisition functions should be performed by contractors. If, however, the government finds it necessary to hand over acquisition functions to contractors, POGO urges DoD to require contracting officers to provide written justification of their decisions and to make those justifications publically available on the web.

Sincerely,

A handwritten signature in black ink, appearing to read "Scott H. Amey", with a long horizontal flourish extending to the right.

Scott H. Amey  
General Counsel  
scott@pogo.org